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2. *Bernstein v. Sky Views*

- a. Trespass limited to height necessary for *ordinary use and enjoyment* of land & structures, landowner has no right above that. *Nuisance* requires multiple incursions.

3. *The Queen in Right of Manitoba v. Air Canada*

- a. *Ad coelum* maxim discredited, as in *Bernstein*; owner can prevent anyone else from acquiring title or exclusive right to space above own land.

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- a. Useless structures are not necessary for the ordinary use of land; since it interferes with neighbour's use of land, constitutes a nuisance; injunction for removal granted.

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- a. Just because you were there first doesn't necessarily give you the right to continue to use airspace - flying doesn't create highways in the sky.

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- a. Moves away from ordinary use of land from *Bernstein*, returns to maxim; ownership from *depths to heavens*; swinging crane is trespass; motives irrelevant. Commercial interest?

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- a. Landowner has property rights below surface, regardless of whether the subsurface cave is accessible from his/her property

8. *Hammonds v. Central Kentucky Natural Gas Co.*

- a. Something can only be property when it is under your dominion (gas becomes chattel, cave becomes realty); upon release, reverts to *ferae naturae*, not property.

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- a. Sets out test for *alternative intent* as it concerns whether a chattel has become affixed. Involves consideration of *degree* and *object* of annexation.

10. *LaSalle Recreations Ltd. v. Canadian Camdex Investment Ltd.*

- a. If attached only by own weight, chattel. Otherwise, if attached even slightly, a fixture. This is rebuttable by alternative intent via *objective standard* (in BC). Also, *permanent* affixation limited to useful lifetime of object, not literal permanency. *LaSalle* {carpet}

11. *Diamond Neon v. Toronto Dominion Realty*

- a. Signs speak for themselves. A sign that relates to specific occupant should be chattel, while a sign which relates to the building itself is a fixture.

12. *L&R Canadian Enterprises v. Nuform Industries*

- a. Machinery is affixed to building in context of making that building a factory. If object easily removed w/o damage (chattel), else, permanently affixed (fixture). Also, items can be *constructive fixtures*, if required for ordinary operation of other fixtures (replacement parts).

13. *Lichty v. Voight*

- a. *Subjective standard* may also be important for alternative intent, for instance where seller has contracted to exempt an affixed item from sale of realty (in ON).

14. *Johnson v. Anderson*

- a. Riparian rights *not* extinguished, but rather as having survived under the *Water Act* except where against a party with a licence under the water act.

15. *Steadman v. Erickson Gold Mining Corp*

- a. Riparian rights extinguished in BC. It is a nuisance to *pollute* groundwater to detriment of water; can *use* water for any purpose, but *not* contaminate it.

16. *Bryan's Transfer Ltd. v. Trail (City)*

- a. Within the power of PG to extinguish riparian rights.

17. *Bradford v. Pickles*

- a. Landowner can extract percolating water for any purpose, w/o regard for others. No one has right to receive percolating water. Holds true regardless of motives.

18. *Micklethwaite v. Newlay Bridge*

- a. When land next to a river or a public highway is sold, *ad medium* rule applies even if this is not indicated by colouring on map or calculation of area. Rebuttable principle, however.

19. *Canadian Exploration Limited v. Rotter*

- a. In *Torrens* system, *ad medium* applies where land is bounded by a non-tidal, non-navigable stream. This relates to difficulty involved in surveying watercourses with flows that vary by season, and the extent to which the *ad medium* principle is embedded in the common law.

20. *District of North Saanich v. Murray* (3)

- a. *Access* - Riparian rights include the right of access to and from water for the private owner, regardless of who owns the bed of the watercourse. Includes right to moor a vessel for at least the period of time needed to load / unload.
- b. *Interference* - Must not be used in a way to interfere with the access rights of other riparian owners, or public navigation rights.
- c. *Foreshore* - If watercourse is tidal, riparian owner can cross but not build on foreshore absent permission from province. If pier or causeway already exists on foreshore, riparian owner has the right to use it.

21. *Welsh v. Marantette* (3)

- a. *Artificial* - artificial waterways do not carry rights themselves. If they are built by expanding a natural waterway which was itself a watercourse, then these rights may continue to apply to the artificial waterway.
- b. *Navigable* - capable of use in its natural state by public for purpose of transportation/ commerce between terminal points that public has access to. Does not include every small watercourse that a little boat could go up, or a private boat harbour.
- c. *Continuity* - Need not be navigable continuously, but fluctuations (e.g. freeze up) must be regular and predictable so dependable so can work commerce around it. Blockages, such as rapids that can be portaged do not interfere with navigability.

22. *Cleland v. Berberick* (2)

- a. *Support* - Owner has right to have one's land supported laterally and subjacently by *neighbouring* land. *Natural right* which passes with land, no need for grant attached to ownership of land in its *natural state*.

- b. *Action of nature* - where direct action of a neighbour, eg. *excavation of sand*, leads to loss of support damage through the direct or indirect *action of nature*, eg. *blowing away sandy beach by storms*, this is an actionable loss of support.

23. *Bremner v. Bleakley*

- a. *Action of nature* - must have a sufficiently strong chain of causation in order to bring an action. D.'s actions must cause the subsidence, and not merely prevent return of subsided material to allow action in support; could pursue action in nuisance in latter case.

24. *Gillies v. Bortoluzzi*

- a. Assumed that land would have subsided regardless of extra weight of structure, due to gravity. Often actionable in trespass where neighbour burrows under land, or in negligence where involving a mining easement, nuisance.

25. *Rytter v. Schmitz* (2)

- a. *Strict liability* - loss of support itself is a strict liability tort, so no need to show intent, negligence, or trespass. Can also resort to negligence, nuisance, trespass where desirable.
- b. *Structures* - if not in natural state, must show that land would have subsided regardless of extra weight of house. Actionable in nuisance, negligence, trespass.

26. *Pugliese v. National Capital Commission* (3)

- a. *Not absolute* - The right to extract percolating water is not absolute, and must be weighed against the non-absolute right to support.
- b. *Negligence* - reasonable that users of percolating water should contemplate affects of their actions on their neighbours due to physical proximity.
- c. *Nuisance* - interference by neighbours with enjoyment of property; does not require negligence or illegality on part of neighbours. Consideration is whether the interference was reasonable considering neighbours; a balance.

27. *Southern Centre of Theosophy v. State of South Australia*

- a. Accretion applies to windblown sand as well as waterborne deposits. *Theosophy*

28. *AG BC v. Neilson*

- a. Accretion applies to tidal, non-tidal, navigable and non-navigable waterways. When land becomes dry land, becomes part of riparian owner's land. Becomes *manurable* - useful for agriculture, so makes sense to pass it to private hands for use (although this is not

necessary to justify).

29. *Re Bulman*

- a. Must be *horizontal development* attached to adjoining land. Cannot be vertical development, which would be attached to river/stream bed.

30. *Re Monashee Enterprises Ltd. and Minister of Recreation and Conservation BC*

- a. Inland boundaries are not mobile unless grants specifically define them as such. To do otherwise would be impractical. Erosion on the riparian owner's land could move the boundary under the house of a bordering non-riparian owner - this in spite of the fact that only the former, and not the latter could act to prevent erosion.

31. *Re Swan*

- a. *Personalty estates* - Practical need for estates to represent successive interests in personalty. Part of the problem to this end is that personalty can be damaged tortiously, but torts die with the wrongdoer.
- b. *Split title* - when personalty is bequeathed via "estate", this splits the title to the personalty. There is the allodial ownership (which lies with the trustee), as well as the use/benefit, equitable ownership, which can be assigned to various beneficiaries through estate.

32. *Re Fraser*

- a. One with a *life interest* in personalty has only *usufructory* ownership; cannot encroach upon or destroy corpus, can only enjoy its benefit.

33. *Delgamuukw v. British Columbia*

- a. Sets out tests and content concerning Aboriginal title / rights, as well as evidence relevant to disputes over Aboriginal title.

34. *R. v. Marshall / Bernard*

- a. Holds that uses which deviate too far from traditional use of land cannot form the basis of Aboriginal title claim; creates difficulties concerning continuous occupancy in light of nomadic groups.

QUESTIONS

1. Define property

- a. Protects one interest in some subject matter against the entire world, in this way different from the contract idea of *privity* - everyone is a party to the contract of a property interest.

2. Identify the nature of the subject matter of property

- a. Ever expanding, includes personal possessions, land, debts, shares, trademarks, and ever expanding; for instance, the use of a celebrity's face in advertising is now protected as a property interest. There are limits, such as the neighbour to the racecourse; differentiates between business value and property.

3. Identify two elements relating to the classification of property

a. *Real property*

b. *Personal property*

4. Describe real property

- a. *Real property* - also called *realty*, because historically protection would give rise to a *real action*, which would restore object to the plaintiff, rather than compensating. Two types:
 - i. *Corporeal hereditaments* - can be touched, can be inherited. Generally refers to land and anything that becomes a part of it (*fixtures*).
 - ii. *Incorporeal hereditaments* - rights arising from the land, able to be inherited, but not the land itself. Two types:
 1. *Easement* - privilege without profit; can include a right of way (most common mode), can also be prescribed where applicable - right to structural support after 20 years, for instance.
 2. *Profit a prendre* - privilege with profit; the right to the benefit of the land.

5. Describe personal property

- a. *Personal property* - also called *personalty*. Two types:
 - i. *Chattels real* - for instance, a lease (historically, now more similar to realty); a personal interest in property.
 - ii. *Chattels personal* - also called *pure personalty*. Two types:

1. *Chose in possession* - thing you can take possession of, tangible, corporeal; goods are defined as chattels personal other than money or choses in action. Two types:
 - a. *Fungible* - items considered identical, completely interchangeable; particularly where goods are not *ascertained*
 - b. *Non-fungible* - item considered unique, not interchangeable.
2. *Chose in action* - abstract entity, only get value through legal or other action. Includes debts, currency, and intellectual property.

6. Identify eight torts used to protect property rights

- a. Trespass to land
- b. Trespass to chattels
- c. Conversion
- d. Nuisance - interference by act or omission without authority re: use and enjoyment of land; private (against occupier) and public (against rights common to all, if suffered more than the general public); based on *objective* test.
- e. Loss of support
- f. Detinue - wrongful detention of personalty
- g. Negligence
- h. Appropriation of personality - protects celebrities against unauthorized use of their images to endorse products

7. Describe seven elements concerning height of land ownership

a. **MKBACHW**

i. *Maxim*

1. Whoever owns the soil, holds title up to the heavens and down to the depths

ii. *Kelson* {tobacconist}

1. Incursion into airspace creates an action in *trespass*; remedy of *injunction* appropriate, as damages would force landowner to sell rights against will.

iii. *Bernstein* {photograph}

1. Trespass limited to height necessary for *ordinary use and enjoyment* of land & structures, landowner has no right above that. *Nuisance* requires multiple incursions.

iv. *Air Canada* {tax}

1. Maxim discredited, as in *Bernstein*; owner can prevent anyone else from acquiring title or exclusive right to space above own land.

v. *Campbell* {finger}

1. Useless structures are not necessary for the ordinary use of land; since it interferes with neighbour's use of land, constitutes a nuisance; injunction for removal granted.

vi. *Hashem* {tower}

1. Just because you were there first doesn't necessarily give you the right to continue to use airspace - flying doesn't create highways in the sky.

vii. *Woollerton, Lewvest* {crane}

1. Moves away from ordinary use of land from *Bernstein*, returns to maxim; ownership from *depths to heavens*; swinging crane is trespass; motives irrelevant.

8. Describe two elements concerning the depth of land ownership

- a. Landowner has property rights below surface, regardless of whether the subsurface cave is accessible from his/her property. *Sims* {cave}
- b. Something can only be property when it is under your dominion (gas becomes *chattel*, cave becomes *realty*); upon release, reverts to *ferae naturae*, not property. *Hammonds* {gas}

9. What are fixtures?

- a. Refers to personalty which has become affixed to the land, and therefore a party of realty. Otherwise, it will remain chattel. Consider a tree (realty), chopped down (chattel), and built into house (realty).

10. Identify three rules which govern fixtures

- a. Three rules govern this:
 - i. Greater absorbs lesser, with a view to market value;

ii. Determine whether there is possibility of separate, useful existence

iii. Determine whether objects could be separated without damage

11. What standard is relevant to whether an object has become a fixture?

- a. If attached only by own weight, *chattel*. Otherwise, if attached even slightly, a fixture. This is rebuttable by *alternative intent* via objective standard (in BC). *LaSalle* {carpet}
- b. But, *subjective standard* may also be important, for instance where seller has contracted to exempt an affixed item from sale of realty (in ON). *Lichty* {trailer}

12. Describe the test relevant to whether an object has become a fixture

- a. *Degree of annexation* - how well affixed is the object? *Davis* {bowling}:
 - i. ALSO, permanent affixation limited to the usable lifetime of the object, need not be forever. *LaSalle* {carpet}
 - ii. ALSO, easily removed w/o damage (chattel) or permanently affixed (fixture)? *Nuform* {machinery}
- b. *Object of annexation* - why was the item affixed? So as to allow for better use of the item itself (chattel), or rather to enhance value of the realty (fixture)? *Davis* {bowling}
 - i. ALSO, sign that relates to specific occupant should be chattel, while a sign which relates to the building itself is a fixture. *Diamond* {sign}
 - ii. ALSO, items can be *constructive fixtures*, if they are required for ordinary operation of other fixtures (replacement parts). *Nuform* {machinery}

13. Describe the nature of water ownership

- a. Like wild animals and underground gas, cannot have title in water until it is captured, although scientifically different since water is always evaporating.

14. Describe three categories of water relevant to property rights

- a. *Surface water* - rainwater, snowmelt, water that *squanders* itself. At common law, can protect self from flood w/ reasonable selfishness (put up sandbags even if this floods neighbour). Cannot pump water already on your land onto neighbours.
- b. *Watercourse* - defined channel either on surface of land or underground, subject to riparian rights. Riparian land is at border of land and water - must be touched by water each day. Includes lakes, sea. With sea, tidal rivers, riparian land extends to *mean high water mark*.

Distinct channel with visible margins. *Welsh*{Ditch}

- c. *Percolating* - underground water, trickling/oozing like water through a sponge, no defined channel like underground stream (i.e. not a watercourse).

15. Describe three aspects of riparian rights in BC

- a. *Acquisition* - received from English common law; however, England is always wet, so it is not clear whether riparian rights are an appropriate doctrine for Canada.
- b. *Natural right* - come naturally with the land (like support and accretion), do not have to be acquired independently (like easement by grant).
- c. *Deprecated* - Mostly replaced by the *BC Water Act*. However, it can be said that some common law rights are retained; they are still valid except against parties with licences under the *Water Act*.

16. Identify six aspects of riparian rights at common law

- a. *Definition* - refers to the ordinary use, extraordinary use, flow and access of water in a watercourse which borders one's property.
- b. *Ordinary use* - take water in any quantity for ordinary purposes such as domestic and watering stock (even to the point of exhausting water for downstream riparian owners)
- c. *Extraordinary use* - take reasonable amounts of water for irrigation, manufacture, etc., so long as substantially returned so watercourse not significantly reduced in flow or character
- d. *Flow* - downstream riparian owner entitled to a flow not substantially altered in volume or quality (pollution)
- e. *Access* - to and from water.

17. Describe s.1 of the *BC Water Act*

- a. Provides the following definitions concerning water and water use:
 - i. *Domestic purposes* - for household use, sanitation, fire prevention, domestic animals and poultry, and irrigating small gardens
 - ii. *Groundwater* - water below surface of ground
 - iii. *Stream* - natural watercourse or source of water supply, whether usually containing water or not, ground water (but see s.3 below), and a lake, river, creek, spring, ravine, swamp, gulch

iv. Unrecorded water – right to use not held under license or under a special or private Act

18. Describe s.2(1) of the *BC Water Act*

- a. *Ownership* – Holds that the title, right to use and flow of all water in any stream in BC vested in government, except only in so far as private rights have been established under license or approvals given under this or a former Act.

19. Describe s.2(2) of the *BC Water Act*

- a. *Prescription* – Holds that no right to divert or use water may be acquired by prescription. Prescription = manner of acquiring property as a result of use/enjoyment of land openly and peacefully for a prescribed period of time (like adverse possession).

20. Describe s.3 of the *BC Water Act*

- a. *Proclamation* – a proclamation by the LG in Council may make this act apply to groundwater / percolating water. Automatically applies to water in underground watercourse, however.

21. Describe s.3(2) of the *BC Water Act*

- a. *Percolation* – enacted after proclamation in s.3 was made, vests title and right to use of percolation and groundwater to the government.

22. Describe s.4(2) of the *BC Water Act*

- a. *Diversion of unrecorded water* – it is not an offence to divert unrecorded water for domestic purposes. However, this is not a positive right to take that water; it is a shield against prosecution, not a sword with which one can assert one's rights.

23. Describe s.5 of the *BC Water Act*

- a. *Licences* – licenses allow holder to divert water according to specified use, time, and quantity; to store water; construct necessary works; alter/improve stream.

24. Describe s.41 of the *BC Water Act*

- a. *Offences* – one commits an offence if: hinders or interferes with license holder or their works; puts sawdust, timber, tailings, gravel, refuse, etc. in stream after having been ordered not to; diverts water without authority, or more than authorized to, or that cannot use beneficially; makes changes in and about a stream without authorization.
- b. *Penalties* – fines are up to \$200,000 per day or imprisonment not exceeding 12 months, or both

25. Describe s.41(1) of the *BC Water Act*

- a. *Exception* - it is not an offence to divert water to extinguish a fire - but flow must be promptly restored.

26. Describe two approaches concerning the deprecation of riparian rights in BC

- a. There has been no SCC conclusion on this matter, but it is likely that the second opinion will hold greater sway, given the age of *Johnson*{Divert}.
 - i. *Vestiges* - were initially held not to be extinguished, but rather as having survived under the *Water Act* except where against a party with a licence under the water act. *Johnson* {Divert}
 - ii. *Extinguished in obiter* - within the power of PG to extinguish riparian rights. *Bryan's Transfer*{Trail}. Riparian rights held to be extinguished in *Schillinger*{Trout} - however, judge ITC did not need to consider riparian rights, ergo semi obiter. Decision was also affirmed in obiter in *Steadman*{Gold}.

27. Describe the consequence of the extinguishment of riparian rights in BC for landowners

- a. Also, note that riparian owners could still sue for nuisance if rights interfered with, as enjoyment of land diminished, although such claims undermined if water use was illegal to begin with.

28. Describe two approaches concerning the right to use percolating water in BC

- a. There is significant doubt as to whether percolating water actually exists; science seems to indicate that all water is in fact in a watercourse of sorts. The non-absolute rule appears to be the dominant approach in Canada. *Pugliese*{NCC}
 - i. *Absolute* - landowner can extract percolating water for any purpose, w/o regard for others. No one has right to receive percolating water. *Bradford*{Pickles}
 1. *Motive* - use allowed regardless of motive - if one has a *right* to something, one is free to squander it (distinct. from Campbell's metal finger). *Bradford*{Pickles}
 2. *Limited to use* - it constitutes nuisance to pollute groundwater to detriment of water; can use water for any purpose, but not contaminate it. *Steadman*{Gold}.
 - ii. *Not absolute* - the right to extract percolating water is not absolute, and must be weighed against the non-absolute right to support. *Pugliese*{NCC}

29. Describe foreshore

- a. *Definition* - refers to an area subject to tidal fluctuations of water, the land between low and mean high water line - does not include land covered only by high-spring or extraordinary tides. Any land that goes down to mean high water line is riparian.
- b. *Ownership* - owned by provincial crown. Justification is that this land is not *manurable*, ie. usable for agriculture.

30. Describe *ad medium filum aquae*

- a. *Definition* - Holds that riparian land owners on either side own their half of stream bed out to centre of stream, unless otherwise stated / intended with knowledge on both sides. Relates to the idea that the riparian owner can make best use of adjacent stream bed.
- b. *Operation* - when land next to a river or a public highway is sold, *ad medium* rule applies even if this is not indicated by colouring on map or calculation of area. However, this is a rule of construction, not a common law rule; used to aid interpretation, rebuttable. *Micklethwaite*{Bridge}

31. Describe the rebuttal of the *ad medium* rule

- a. *Express intention* - *ad medium* does not apply if there is express contrary intention in the conveyance. *Micklethwaite*{Bridge}
- b. *Implication* - circumstances known to both parties at time of conveyance show intention by vendor to make use or not convey that part of stream bed. *Micklethwaite*{Bridge}

32. Describe three issues concerning the modern applicability of the *ad medium* rule in BC

- a. *Torrens system of title* - under this system, *ad medium* applies where land is bounded by a non-tidal, non-navigable stream. This relates to the difficulty involved in surveying watercourses with flows that vary throughout the year, and the extent to which the *ad medium* principle is embedded in the common law. *Rotter*{Works}
- b. *BC Land Act* - provisions enacted which phase out the *ad medium* rule.
- c. *Aboriginal reserves* - not entirely clear, as this has only ever been considered concerning navigable waterways. However, presumed that if waterway not navigable, *ad medium* rule would apply. *Lewis*{FNAM}

33. Describe s.55(1) and s.56(2) of the *BC Land Act*

- a. No part of bed or shore passes unless:

- i.* Red colour used on map to denote;
 - ii.* Express provision to contrary;
 - iii.* Minister otherwise directs.
- b.* The above does not affect:
- i.* Court claims settled before 1961;
 - ii.* Indefeasible titles issued previous to 1961 which specifically include bed (regardless of colour used to denote);
- c.* As new titles issued every time land is sold, all titles will eventually fall under s.55(1) and therefore gradually reverse decision in *Rotter*{Works}.

34. Describe the ownership of waterbeds

- a.* Two types:
- i.* *Sea beds* - ownership is a constitutional issue between the Fed and PG governments.
 - ii.* *River/stream beds.* Two types:
 1. *Tidal* - treated in same way as foreshore, bed owned by provincial crown
 2. *Non-tidal.* Two types:
 - a.* *Navigable* - (like a “highway”), bed vested in provincial crown (at least in western provinces and Ontario)
 - b.* *Non-navigable.* Two types:
 - i.* *Old certificate of title* - rebuttable rule of *ad medium* applies; indefeasible title issued previous to 1961 which specifically denotes conveyance of bed.
 - ii.* *New certificate of title* - governed by s.55 and s.56 of *BC Land Act*, *ad medium* rule doesn’t apply.

35. Describe the riparian right to access a watercourse

- a.* *Definition*
- i.* *General* - riparian rights include the right of access to and from water for the private owner, regardless of who owns the bed of the watercourse. *Saanich*{Wharves}

ii. *Vessel* - also includes right to moor a vessel for at least the period of time needed to load / unload. *Saanich*{Wharves}

iii. *Tidal* - if watercourse is tidal, riparian owner can cross foreshore, but not build on foreshore absent permission from province. If pier or causeway already exists on foreshore, riparian owner has the right to use it. *Saanich*{Wharves}

b. *Limitations*

i. *Interference* - must not be used in a way to interfere with the access rights of other riparian owners, or public navigation rights. *Saanich*{Wharves}

ii. *Private* - rights extend to the private owner only, and not the general public. *Saanich*{Wharves}

36. Describe the applicability of riparian rights to artificial waterways

a. Artificial waterways do not carry rights themselves. If they are built by expanding a natural waterway which was itself a watercourse, then these rights may continue to apply to the artificial waterway. *Welsb*{Ditch}

37. Describe the applicability of navigation rights to a watercourse

a. *Definition* - Capable of use in its natural state by public for purpose of transportation/ commerce between terminal points that public has access to. Does not include every small watercourse that a little boat could go up, or a private boat harbour. *Welsb*{Ditch}

b. *Continuity* - Need not be navigable continuously, but fluctuations (e.g. freeze up) must be regular and predictable so dependable so can work commerce around it. Blockages, such as rapids that can be portaged do not interfere with navigability. *Welsb*{Ditch}

38. Describe the nature of the right of support

a. *Definition* - one has right to have one's land supported laterally and subjacently by *neighbouring* land. This is a *natural right* (passes with land, no need for grant) attached to ownership of land in its *natural state*. Relates to idea that right of support concerns right to enjoy one's land in its natural state, protects against actions of neighbours which cause subsidence. *Cleland*{BeachStorm}

39. Identify remedies relevant to loss of support

a. Loss of support itself is a strict liability tort, so no need to show intent, negligence, or trespass. Can also resort to negligence, nuisance, trespass where desirable. *Rytter*{AptCollapse}

40. Describe two types of support

- a. *Horizontal / lateral* - if not in natural state, must show that land would have subsided regardless of extra weight of house. Actionable in nuisance, negligence, trespass. *Rytter* {AptCollapse}
- b. *Vertical / subjacent* - often assumed that land would have subsided regardless of extra weight of structure, due to gravity. Often actionable in trespass where neighbour burrows under land, or in negligence where involving a mining easement, nuisance. *Gillies* {StoreCollapse}

41. Describe three limitations of loss of support actions

- a. *Natural state* - land must be in its *natural state*. One does not have right to the support of one's land AND a structure that one has erected on it, for instance. *Gillies* {StoreCollapse}
- b. *Inevitable* - action for loss of support can only survive outside of natural state if one can show that land would have subsided regardless of extra weight. *Gillies* {StoreCollapse}
- c. *Applicability* - not just structures, also applies to fill; anything which would interfere with ability to determine whether subsidence was inevitable. *Welsh* {Ditch}

42. Describe the interrelation between loss of support and the action of natural forces

- a. *Direct* - where direct action of a neighbour, eg. *excavation of sand*, leads to loss of support damage through the direct or indirect *action of nature*, eg. *blowing away sandy beach by storms*, this is an actionable loss of support. *Cleland* {BeachStorm}
- b. *Indirect* - must have a sufficiently strong chain of causation in order to bring an action. Where sand is blown off of one's property by storms, and captured by neighbours who have dug trenches for this purpose, this is not actionable. D.'s actions did not cause the subsidence, but rather only prevented return of sand thereafter. Could possibly have pursued an action in nuisance, however. *Bremner* {SandTrench}

43. Describe prescription as it applies to lateral support

- a. *Historically* - in BC, after twenty years of uninterrupted, peaceful, and known use of land to support structures, this becomes prescribed. This was extinguished by Torrens system in 1976. *Rytter* {AptCollapse}

44. Describe the English rules concerning the right to support by percolating water

- a. *Absolute right* - owners have an absolute right to extract percolating water, regardless of motive, so there can be no action for loss of support by an owner's removal of such water (but not silt or brine). Can exercise right regardless of harm, so no action in nuisance or

negligence either. *Bradford*{Pickles}

45. Describe the American rules concerning the right to support by percolating water

- a. *Varies by state* - Some states have absolute right, others limit right by precluding extraction for wastage or to deliberately injure one's neighbour. Others have *correlative rights* doctrine, where water is apportioned, as there is not enough for all reasonable uses. Have allowed negligence actions where harm could have been reasonably avoided. *Pugliese*{NCC}

46. Describe the Canadian rules concerning the right to support by percolating water

- a. *Not absolute* - must be weighed against the right of an owner to extract percolating water, which is also non-absolute. One has a right to not be subjected to interference with such support to the extent that it amounts to negligence or nuisance. *Pugliese*{NCC}
 - i. *Negligence* - reasonable that users of percolating water should contemplate affects of their actions on their neighbours due to physical proximity.
 - ii. *Nuisance* - interference by neighbours with enjoyment of property; does not require negligence or illegality on part of neighbours. Consideration is whether the interference was reasonable considering neighbours; a balance. *Pugliese*{NCC}

47. Describe accretion

- a. *Definition* - growth of land at border with water, either by build up of bank by deposits carried in water and dropped so they attach to the adjoining land, or by previously submerged land exposed by receding water. Similarly with loss of land through erosion or diluvian i.e. advancing water.
- b. *Nature* - some think of this as a natural right or land like riparian rights and right of support, others think of it as a rule of convenience. Considered to be fair since landowner will have additions (accretion or receding water) and losses (erosion or advancing water), and convenient to regard boundary as between land and water as it changes over the years.
- c. *Exclusion* - can be expressly excluded through conveyance documents, but it is not sufficient to colour on maps or delineate. *Theosophy*{Aussie}
- d. *Application* - Applies to tidal, non-tidal, navigable and non-navigable waterways. *Neilson* {Highway} Applies to windblown sand as well as waterborne deposits. *Theosophy*{Aussie}

48. Describe the requirements and limitations governing the applicability of accretion

- a. *Requirements* - gradual, imperceptible, stemming from natural causes or from human activities not intended to grow or shrink land. Must be *horizontal development* attached to adjoining land. *Bulman*{Island}. Imperceptible where consolidation amounting to stable

advance of land cannot be perceived. *Theosophy*{Aussie}

- b. *Limitations* - Does not include sudden and perceptible loss or addition to land e.g. significant shift in stream after flood or earthquake, in which case boundaries remain the same – note virtually no case law on this since normally government intervenes in such circumstances. Does not include *vertical development*, which is adjoined to waterbed, owned by owner of the bed. *Bulman*{Island}

49. What happens when accretion occurs on tidal boundary?

- a. *Adjoins to riparian land* - when land becomes dry land, no longer foreshore that belongs to Crown (i.e. between low and mean high water marks), rather becomes part of riparian owners land. this land is now “manurable” i.e. useful for agriculture, so makes sense to pass it to private hands for use. *Neilson*{Highway}
- b. *De minimis* - not really relevant since accretion can be considerable land area over years.
- c. *Manurability* - not relevant in determining whether land is accreted. This is a separate concern. *Neilson*{Highway}

50. Describe the effect of movement of the mean high water mark on inland property boundaries

- a. Inland boundaries are not mobile unless grants specifically define them as such. To do otherwise would be impractical. Erosion on the riparian owner’s land could move the boundary under the house of a bordering non-riparian owner - this in spite of the fact that only the former, and not the latter could act to prevent erosion. *Monashee*{Snake}

51. Describe the history of tenures

- a. Feudal system - 1066, William the Conqueror created social pecking order by taking over all land in England and then giving out to supporters of his conquest of the Anglo-Saxons (including some Anglo-Saxons). Roughly speaking, the kind of *tenure* specified the obligations that such land holders had to give to their lord, whereas the type of *estate* specified how long the holding would last.
- b. Tenures ceased to have practical significance around 1660 (Abolition of Tenures Act) Tenures not *quantitative* (like estates which specify time period of occupation) but *qualitative* relationships (i.e. related to social/political/status/wealth set up).
- c. Over time, pyramid flattened with more tenures held directly from King. Thus incidents provided King much money, allowing maintenance of Stuarts reign independent of parliament – incidents of tenure abolished (except escheat and forfeiture) in 1660 for this reason. Only came over in very theoretical way e.g. land for Hudson’s Bay Company required them to provide a little food for Royal visits

52. Describe the hierarchy of land grants in the feudal system

- a. Free men (aristocracy) - via tenure and estate;
 - i. *King* – *allodial owner*, has absolute ownership of all land. Still the case today, as all land held in estates granted by the Crown.
 1. *Tenants-in-chief* – normally Barons, top aristocrats, hold land from the King under loyalty: *fealty* (oath to be faithful) and *homage* (acknowledgement King is his Lord), with protection coming down
 - a. *Mesne* – lower lords, subdivide land and grant to other lords below
 - i. *Demesne* – lords at bottom who hold land to occupy for themselves. The King, Tenants in Chief and Mesne lords would all hold some demesne land for themselves (called *Royal Demesne* in case of King)
- b. *Unfree men* - (peasants / serfs) via copyhold tenure;
 - i. *Villeins* – entitled to hold small patches land, according to particular customs/rules of the particular manor (i.e. land of a Tenant in Chief) at a particular time. Copyhold continued in England till 1926 (when converted to *freehold socage*) but never existed elsewhere.

53. Describe four types of tenure

- a. Reflect status and involved different services to overlord. These conditions eventually became obligations/advantages connected to the land itself, so passed with it.
 - i. *Knight service* - Tenants in Chief normally held this most prestigious type. Initially had to provide knights to overlord (militia type of system), 12th century provided money (*scutage*) to allow King to build professional army, and politically holders of this tenure type sat on governing body under King – converted to *socage* in 1660.
 - ii. *Serjeanty* – personal service. Grand serjeanty involved providing services at Royal events, sports, military campaigns – fell into disuse except minor e.g. coronations. Petty serjeanty less prestigious services. Converted to *socage* in 1660.
 - iii. *Frankalmoin* – spiritual/ecclesiastical service to overlord – fell into disuse.
 - iv. *Socage* – agricultural obligation. This is the type that still exists, in theory, today.

54. Describe the nature of freehold tenure

- a. *Certainty* - could not demand services of freemen at will. Therefore, nature of freehold tenure, obligations therein had to be certain, well defined. Estates are uncertain, as they are

reliant on periods of time (such as one's lifespan) which cannot be predicted.

- b. *Incidents* - however, exception to certainty are incidents, which constitute additional obligations to services. For instance, *aids*, in which lower lord must come to aid of superior lord in emergency, perhaps by raising ransom if held hostage. Escheat (expiry of estate) and forfeiture (seizure in case of treason) are other examples.

55. Differentiate between subinfeudation and substitution

- a. *Subinfeudation* - everyone remains in feudal chain, and when estate is alienated in whole or in part, an additional rung is added at the end of the chain. Similar to subleasing.
- b. *Substitution* - where alienated in whole or in part, the substitute will be responsible for the obligations of the original tenure holder in wholly or partially. Similar to lease assignment.

56. Describe the statute of Quia Emptores

- a. Passed in 1290, concerned purchases; is still in effect today. Created the basis for free alienation, and replaced *subinfeudation* with substitution in fee simple circumstances. Modern name would be the right of free alienation.

57. Describe estates

- a. *Definition* - legal concept granting the right to possess and occupy land for a certain time, but separate from the land itself; unlike tenures where obligations passed with land. Quantitative (not qualitative like tenures): title to land for period of time after which it passes to next successive estate owner, or if none, escheats back to Crown (*BC Escheats Act*). Rather only own an interest (i.e. an estate) in the land, and inherently *uncertain*.

58. Identify four types of freehold estate

- a. Fee simple
- b. Fee tail
- c. Life estate
- d. Pour autre vie

59. Describe fee simple estates

- a. *Definition* - Fee (*inheritable*) simple (*without qualification*). Defined by *words of purchase* ("To X") and *words of limitation* ("and X's heirs"). The grant is to X, does not confer anything directly to X's heirs. Can be freely alienated, and held as long as there are descendants or a testacy conveying the land.

- b. *Limitation* - can theoretically hold forever, ergo closest approximation to absolute ownership other than the Crown's allodial ownership. But, if one dies intestate and no heirs escheats to Crown and estate ends. *BC Escheats Act*

60. Describe fee tail estates

- a. *Definition* - occurs where there is a qualification in the words of limitation; for instance, could limit to male or female descendants, or lineal descendants of X only.
- b. *Limitation* - if one inherits a fee tail, one cannot give a fee simple, as one cannot grant what one does not have.

61. Describe life estates

- a. *Definition* - an estate which lasts for the lifetime of the person to whom the estate is granted.
- b. *Limitations*
 - i. *Reversion* - the grantor of a life estate has a *reversion*, or a future interest. Effectively, when the grantee dies, whatever remains of the grant reverts back to the grantor (called the reversioner).
 - ii. *Remaindership* - if a fee simple owner grants a life estate to X, and fee simple to Y thereafter, Y is the remainderman. Y receives whatever remains of the estate following the laps of X's life estate. This must be part of the same grant or instrument; if separate instruments, then the estate would revert to the grantor.
 - iii. *Contingency* - can be imposed by grantor. Effectively, right will not be vested until contingency met, and will generate an automatic reversion if the contingency fails. For instance, land to be granted to X for life, then to Y once Y reaches 19 years of age. If X dies at age 18, land reverts to grantor on X's death.

62. Describe pour autre vie estates

- a. *Definition* - life estate granted not for the life of the person occupying the land, but rather the life of another person.

63. Describe control from the grave

- a. Grantor can create a number of estates in succession, and thus manipulate the ownership of land even after death.

64. Describe leasehold estates

- a. Originally a tenant could not recover possession if evicted by a third party (although they could against landlord), and so fell far short of an interest in land; hence considered personalty rather than realty. But over time, protection against dispossession strengthened and became to be treated as a freehold interest, hence the name *chattel real*. Duration of lease set at time of creation.

65. What are trusts?

- a. As opposed to ownership at common law, relate to equity. Modern trusts can be used by a donor/grantor to give legal title to one person (the trustee), while giving "equitable title" i.e. use/benefit to another (the cestui que use, i.e. beneficiary)

66. Describe the history of trusts

- a. Reflects the Courts of Chancery, which allowed petitions to the Crown due to occasional inadequacy of the common law. Chancery/Equity did not try to overturn the common law, rather devised a set of rules to parallel it. Changed the result without changing the law. In 1870's systems came together: law allowed judges of one system to apply rules of other

67. Describe use and feoffment

- a. *Definition* - Refers to the grant of *use*. Would work as follows: grantor gives land to X in fee simple for the use of Y in fee simple. In this case, the grantor is the *feoffor*, X is the *feoffee*, and Y is the *cestui que use*. One holds estate not for one's own benefit, but rather for the benefit of others.
- b. *Purpose* - allows one to avoid incidents of tenure. For instance, to avoid wardship - if land falls to an underage heir, superior lord can take all profits from land, and payment must be made upon marriage. Additionally, *Statute of Mort Main* prevented estates passing to incorporeal bodies, therefore ecclesiastical orders could only own through use.
- c. *Limitation* - common law courts only consider the fee simple grant, therefore chancery required in order to enforce legal position of *cestui que use*. Equity would not change the common law ownership (the fee simple), but would impose sanctions *in personam* against the *feoffee* if the *cestui que use* was not receiving benefit of the land.

68. Describe the Statute of Uses

- a. Enacted in 1535; use allows lords to avoid granting revenue to the Crown through incidents of tenure. This statute changed the situation by granting fee simple to the *cestui que use*.
- b. Led to the development of loopholes, in particular the "double use" - A to B in fee simple to the use of D in fee simple to the use of C in fee simple. Initially failed to work in *Tyrell*,

but eventually upheld in *Sambach*, found to *exhaust* the statute.

69. Describe the emergence of the modern trust

- a. Involves a truncated double use invocation; A to B in fee simple to the use of C in fee simple; additional party (D in double use) no longer required. Can also use “A to B in fee simple in trust for C in fee simple”, although this flirts with the *Statute of Uses*.

70. Describe three elements required to create a trust

- a. *Intention* - must be a certainty of intention to create a trust
- b. *Subject* - must be certainty concerning the subject matter of the trust (eg. the thing being conveyed in trust)
- c. *Parties* - must be certainty concerning who the parties are, and in particular, the beneficiaries of the trust

71. What happens when there is a conflict between innocent purchaser and innocent beneficiary concerning a trust?

- a. If the trustee sells land held in trust to an innocent purchaser, creating a conflict between the purchaser and the beneficiary, the purchaser's interests are paramount. The *nemo dat* principle does not apply, because the trustee had the common law title, and therefore the right to sell the land.
- b. Common law does not care about uses or trusts. The beneficiary can sue the trustee for restitution via equity, but they may be destitute, or could have left country.

72. Describe the doctrine of notice

- a. Equitable doctrine which attempts to protect the beneficiaries of trusts. This allows the trustee to sell the title to the purchaser, but the beneficiary will retain interest in benefits of land. That is to say that the title will still be subject to the beneficiary's use.
- b. Protection valid where:
 - i. Purchaser *not bona fide*, and
 - ii. Beneficiary interest was *for value* (eg. wasn't granted trust as a reward for volunteer labour), and
 - iii. Notice was *not* given (whether actual or constructive).

73. Describe estates in personal property

- a. *Definition* - Personal property is allodial, and therefore there are no estates in personalty; however, there is a practical need for estates to represent successive interests in personalty. Part of the problem to this end is that personalty can be damaged tortiously, but torts die with the wrongdoer. *Swan*{Jewels}
- b. *Application* - when personalty is bequeathed via “estate”, this splits the title to the personalty. There is the allodial ownership (which lies with the trustee), as well as the use/benefit, equitable ownership, which can be assigned to various beneficiaries through estate. *Swan*{Jewels}

74. Identify three limitations to concerning estates in personal property

- a. *Consumables* - today, generally consist of bonds/shares rather than land; combines personalty & realty. Can't be done with consumables or future property. *Swan*{Jewels}
- b. *Reluctance* - the nature of chattels makes it difficult to separate title from thing itself, Courts reluctant to recognize the principles. *Swan*{Jewels}
- c. *Usufruct* - one with a *life interest* in personalty has only *usufructory* ownership; cannot encroach upon or destroy corpus, can only enjoy its benefit. *Fraser*{Charity}

75. Describe marital unity

- a. *Marital unity* - woman lost all property upon marriage, man becomes entitled to all income from land. However, could only sell with mutual permission. However, woman could not contract or sue. Jointly liable for torts. Man obligated to support her into widowship. This type of relationship related to *coverture* (under wing and cover). This concept dismantled over time, dead in Ontario by 1978.

76. Describe the relevance of equity to marital unity

- a. *Equity* - used to elude the limitations of marital unity on women. Through a marriage settlement, “use” was used to allow wife to have property separate from her husband (and his creditors). Title held by a third party trustee/feoffee for use of wife. Wife could dispose of this equitable property by deed or will, and could be her own trustee. Could contract, sue and be sued in respect to this property. Restraints on alienation (disallowing *inter vivos* transfer) could be added to avoid coercive transfer to husband, to set up such separate property required expensive lawyers, so practically only available to the wealthy.

77. Describe curtesy

- a. If wife died, husband (widower) automatically got life estate in all lands she brought into the marriage (provided that she would have been entitled to those lands upon her death, and that she had had a child capable of subsequently inheriting the land). Abolished in

B.C. in 1925 by the *Administration Act Amendment Act*.

78. Describe dower

- a. If husband died, wife (widow), provided certain conditions met (e.g. she was capable of producing a child who would be capable of inheriting the land), was entitled to 1/3 of deceased husband's realty. Designed to provide her with shelter, and overruled the rules of primogeniture i.e. that eldest son takes all property on death of father. Husbands could insulate their property from dower through a form of conveyance called "deed to uses". Also abolished in B.C. in 1925 by the *Administration Act Amendment Act*

79. Describe the Married Women's Property Act

- a. Enacted 1882 adopted the equity approach to allow married women to have separate property as if they were *feme sole* (i.e. like unmarried women who could own property like men). Similar legislation throughout common law provinces.

80. Describe the impact of the abolishment of dower, curtesy, and marital unity

- a. With separate property, and now that marital unity, curtesy and dower are gone, need legislation to deal with property during marriage, on marriage breakdown, and when one spouse dies.

81. Is there such thing as aboriginal title?

- a. Calder, 1973, six of seven SCC justices said that there was such a thing as aboriginal title, but did not define it or attempt to give it content. Judges split on whether the title in that case had in fact been extinguished.
- b. Aboriginal rights must have existed in 1982 to be protected by s.35. Because of S.91(24) only the federal government had the power (prior-1982) to extinguish aboriginal title, but they must have done so with a "clear and plain" intent. Thus BC did not have the power of extinguishment after 1871. After ordering new trial, Lamer C.J. recommended negotiations, and ended "Let us face it, we are all here to stay". *Delgamuukw* {FNTtitle}

82. Identify three competing meanings of aboriginal title

- a. *Tenancy at will* - not enforceable, merely a moral right to occupy which can be terminated at the whim of the sovereign. Has to assume that the treaties extinguishing Aboriginal title were sham transactions, as aboriginals would have had no rights to cede.
- b. *Personal right* - enforceable interest, but consists merely of non-exclusive rights to hunt, fish, trap, and pick berries on traditional lands. These are not really a property right, and can be surrendered only to the Crown.

- c. *Communal ownership* - property right in traditional lands, similar to fee simple, protected by law of trespass, can only be surrendered to the Crown, and even where surrendered usually ceding party retains right to hunt, trap, fish, etc on that land.

83. Identify three processes which work to establish and define the nature of aboriginal title

- a. *Courts* - the process of going through the Courts (Delgammukw). Expensive, drawn out.
- b. *Treaty* - the process of negotiating a treaty (N'isgaa). Expensive, drawn out.
- c. *Economic development* - probably serve the community and the province better in the long term than either the Court or treaty systems.

84. Describe the nature of s.35(1) of the *Constitution Act*

- a. *Definition* - Constitution Act, 1982 - s.35(1) does not create aboriginal rights, but affirms these rights as they existed at the time of the Act's passage. They are therefore constitutionally entrenched. The section does not elaborate on the nature of these rights, however. *Delgamuukw*{FNTitle}
- b. *Application* - according to the SCC, the overriding objective of s.35 is reconciliation of prior occupancy by Aboriginals with Crown sovereignty. Requires reference to both aboriginal law/history of particular group and common law, and not exclusively one or the other approach. *Delgamuukw*{FNTitle}
- c. *Spectrum* - S.35 protected rights fall along a spectrum, and title is only one example of such rights. *Delgamuukw*{FNTitle}

85. Describe the spectrum of Aboriginal rights in s.35 according to *Delgamuukw*{FNTitle}

- a. *Free standing right* - practices, customs, traditions integral to distinctive culture, but not sufficient to support title claim.
- b. *Site-specific right* - such activities that by necessity take place on land, perhaps at specific site, but still not sufficient to support title claim e.g. nomadic people who have seasonal grounds, but not exclusive occupation
- c. *Aboriginal title* - right to the land itself, when land was of central significance to their distinctive culture, activity sufficient to constitute exclusive occupation.

86. Describe six components of the content of Aboriginal title from *Delgamuukw*{FNTitle}

a. **ISLICE**

- i. *Inclusions* - both exclusive use and occupation, and hence is more than just the right to engage in certain activities. "It confers the right to use land for a variety of activities,

not all of which need be aspects of practices, customs and traditions which are integral to the distinctive culture of the aboriginal band". Thus present day needs can be met. E.g. current uses on reserve land go beyond traditional uses, as the Indian Oil and Gas Act makes clear

- ii. *Sui generis* - in and of itself, not derived from some other doctrine / principle, and a mix of aboriginal and common law. Reflects overriding objective of reconciliation b/w systems.
- iii. *Limitations* - activities are limited to ones that are not "irreconcilable with the nature of the attachment to the land", which will differ from claim to claim. Title comes from previous occupancy and use of land, which forms part of distinctive culture, which should be protected for future aboriginal people. Cannot strip mine lands traditionally used for hunting or ceremonies for example (lands *can* be surrendered to Crown and then so used).
- iv. *Inalienability* - can only sell/surrender to Federal Crown, although ownership then reverts to Provincial Crown.
- v. *Communal ownership* - with decisions about it made communally (unlike individual or multiple-individual ownership in common law)
- vi. *Equitable waste* - legal waste is when current holder e.g. life tenant goes beyond just taking income and destroys future interest e.g. for remainderman, and equitable waste is similar waste but destroys interest for someone else.

87. Describe six issues in proving Aboriginal title from *Delgamuukw* {FNTitle}

a. **ECO SET**

- i. *Evidence* - SCC said that oral histories must be considered; did not keep written records historically and so it would now be virtually impossible to prove land claims if follow usual rules of evidence i.e. exception to usual rule of hearsay. Ergo, *adaawk* and *kungax* admissible.
- ii. *Continuity* - prior occupation can be next to impossible to prove, so present occupation can be used as proof of prior occupation, so long as there has been a substantial maintenance of connection to land, even if nature of occupation has changed (within inherent limits), and making allowances for periods of disruptions.
 - 1. LeBel/Fish hold that the test for Aboriginal title may be *incompatible with nomadic* lifestyles / groups, as impossible to prove continuity. *Marshall* {Spruce}^
- iii. *Occupation* - can use common law which recognizes actual physical occupation, and Aboriginal law. Could relate to land tenure or land use systems. So as proof can use:

physical dwellings, cultivation, enclosure of fields, regular use for hunting/fishing/ exploiting resources.

1. LeBel/Fish hold that occupation should not lie in regular/intensive use of land, but rather in traditions/culture of the group that *connect group to land*. Marshall{Spruce}

iv. *Significance* - to gain title, land must have been of central significance to the groups culture. This means more than incidental – must have been either substantial connection or sufficiently important. Alternately, to gain rights, for rights, land must have been an integral part of the distinctive culture of the aboriginal claimants (w/o occupancy).

v. *Exclusivity* - occupation must have been exclusive, since aboriginal title today means right to exclusive use and occupation. Proof includes both common law occupancy, and also aboriginal aspects of particular group, such as exclusive control, requiring permission for others to use the land, or by agreement / treaty allowed others onto land.

vi. *Temporality* - The time for identification of aboriginal title is when British Crown asserted sovereignty over the land i.e. at latest 1846, since prior to that no underlying Crown title on which aboriginal burden could lie, unlike with aboriginal rights when appropriate time is first contact, since afterwards practices sometimes changed.

1. Treaty rights now *frozen in time* of negotiation, to permit pursuit of Aboriginal title reflects historical / traditional activities of group, rather than modern realities. Marshall{Spruce}

88. Describe ability of government to infringe on Aboriginal rights from *Delgamuukw*{FNTtitle}

- a. Aboriginal rights may be *infringed* by both federal and provincial governments, so long as they satisfy test of *justification*:
 - i. *Compelling* - infringements must come from a legislative objective that is compelling and substantial, recognizing that aboriginals are now part of a broader society and attempt at reconciliation of prior occupation with Crown sovereignty
 - ii. *Fiduciary* - must be consistent with fiduciary obligation of Crown to aboriginal peoples to put their interests first (e.g. with fishing, after conservation measures covered, aboriginal fishing for food should have priority, but aboriginal commercial fishing need not have priority over fishing by non-aboriginals)
 - iii. *Consultation* - fiduciary duty requires at least consultation, if not full consent / involvement in management by aboriginals on land they have title to depending on importance of right, and fair compensation will usually be required.

iv. *Minimization* - infringement must infringe as little as possible

v. *Inclusions* - allowable infringements to title may include development of agriculture, forestry, mining, general economic development, protection of environment or endangered species (unclear if this only applies to title, may also apply to rights with no internal limits)